

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 4, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2474

Cir. Ct. No. 2007CV386

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CHRIS J. JACOBS,

PETITIONER-APPELLANT,

V.

DEPARTMENT OF CORRECTIONS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. This is an appeal from an order granting the Department of Corrections' motion to quash or dismiss Chris Jacobs's petition for a writ of habeas corpus. The trial court explained that it was dismissing the petition because it was not verified, and because Jacobs was in prison pursuant to

a final judgment of a court. We agree that Jacobs’s petition was not verified. We therefore affirm.

¶2 On August 21, 1998, Jacobs was convicted of kidnapping and false imprisonment in the circuit court for Marathon County and sentenced to thirty-one years of imprisonment. He recently petitioned the circuit court of Grant County for a writ of habeas corpus, contending that the DOC was giving him insufficient amounts of food. The circuit court denied his petition and he appeals, claiming his petition was improperly dismissed based on “harmless error” and that he has been subjected to “cruel and unusual punishment,” in violation of the Eighth Amendment to the United States Constitution. He asks that as a remedy for the Eighth Amendment violation he be released from his imprisonment.

¶3 Chapter 782 of the Wisconsin Statutes pertains to writs of habeas corpus. WISCONSIN STAT. § 782.04 (2005-06)¹ provides that the “petition must be verified.” Jacobs concedes that his petition was not verified but asserts that this is harmless error, citing FED. R. CRIM. P. 52(a) (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”). He cites no authority holding that the failure to verify a petition is harmless error.

¶4 We have addressed that question. In *Maier v. Byrnes*, 121 Wis. 2d 258, 262-63, 358 N.W.2d 833 (Ct. App. 1984), we said:

We alternatively hold that even if the petition had been timely filed, it failed to meet the statutory requirements of sec. 782.04, Stats., since it was not verified. Thus, the writ was not “legally applied for” pursuant to sec. 782.09, Stats. Adherence to this

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

requirement is not the dependence “upon meticulous observance of the rules of pleading” which has been condemned by certain of the case law. The requirement of verification is addressed to matters of not only form but also substance by assuring that the statements contained therein are presented with some regard to considerations of truthfulness, accuracy and good faith.

Id. (citation omitted). Jacobs’s failure to verify his petition is therefore fatal.

¶5 In *bin-Rilla v. Israel*, 113 Wis. 2d 514, 521, 335 N.W.2d 384 (1983), the supreme court explained that we are to construe pro se complaints to determine if the complaint states any facts giving rise to a cause of action. Though Jacobs is insistent on the remedy he believes habeas corpus gives him, we will consider the remedies of certiorari, mandamus and a 42 U.S.C. § 1983 action. Certiorari will not lie because WIS. STAT. § 801.02(7)(b) provides that a prisoner may not commence a civil action or special proceeding until he or she has exhausted all available administrative remedies that the DOC has promulgated by rule. There is nothing in this record showing that Jacobs has exhausted any administrative remedies pertaining to his belief that he is not being given enough food. Certiorari does not lie.

¶6 Next,

[m]andamus is an extraordinary writ that may be used to compel a public officer to perform a duty that he or she is legally bound to perform. In order for a writ of mandamus to be issued, there must be a clear legal right, a positive and plain duty, substantial damages, and no other adequate remedy at law.

State ex rel. Greer v. Stahowiak, 2005 WI App 219, ¶6, 287 Wis 2d 795, 706 N.W.2d 161 (citations omitted). There is another adequate remedy for Jacobs. He can use the Inmate Complaint System, take the appropriate appeals within the

DOC and, if still aggrieved, appeal to the circuit court. Mandamus will not lie here.

¶7 Jacobs has already brought a 42 U.S.C. § 1983 action in federal court, in an attempt to obtain injunctive relief. *See Jacobs v. Frank*, 225 F. App'x 397 (7th Cir. 2007). He asserted there that he was not getting enough food and that his weight had dropped to 190 pounds, nearly sixty pounds less than he weighed before he went to prison. *Id.* at 398. The Seventh Circuit Court of Appeals noted that a letter from a prison nurse explained that Jacobs is at the top of the 150 to 190 pound range appropriate for a man of his height. *Id.* at 399. The court concluded that “[w]hat Jacobs really contends is that the DOC is obligated to feed him enough to maintain his pre-incarceration weight of 250 pounds, but there is nothing in the record suggesting that his current weight presents a risk to his health.” *Id.* Were we to construe Jacobs’s petition as a 42 U.S.C § 1983 action, there is even less of a record than Jacobs made in federal court. All we have is Jacobs’s assertion that he is being denied adequate food, and the State’s motion to quash or dismiss. That is not enough for Jacobs to prevail in a 42 U.S.C. § 1983 action.

¶8 We conclude that Jacobs is not entitled to be released or to have his time of incarceration reduced. We further conclude that he is not entitled, on this record, to certiorari or mandamus remedies, nor a remedy under 42 U.S.C. § 1983. Accordingly, we affirm the trial court’s order granting the State’s motion to quash or dismiss.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

